Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	WT Docket No. 96-18
Implementation of Section 309(j) of the Communications Act--Competitive Bidding	PP Docket No. 93-253

To: The Commission

COMMENTS ON PETITIONS FOR RECONSIDERATION

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May 9, 1997

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COMMENTS ON PETITIONS FOR RECONSIDERATION

ProNet Inc. ("ProNet"), through its attorneys and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), hereby comments on various petitions for reconsideration of the Commission's Second Report and Order (the "2nd R&O")[1/] in the above-captioned proceeding. ProNet respectfully shows the following:

I. INTRODUCTION AND SUMMARY

In its Petition for Reconsideration, ProNet showed that the 2nd R&O and the rules promulgated therein fail to resolve numerous concerns raised by ProNet and other participants in this proceeding. Absent modification and clarification of these rules, the transition to geographic

[1/]The *2nd R&O* was released February 26, 1997, and was published in the Federal Register on March 12, 1997.

licensing will be wrought with confusion and, in all likelihood, will result in protracted litigation. Specifically, ProNet demonstrated that the Commission should:

1. resolve all pending licensing matters, including all litigation involving pending applications, before conducting auctions;

2. define non-geographic incumbent systems according to the composite interference contours of all authorized transmitters, including valid construction permits, for which applications were pending on or before July 31, 1996, irrespective of grant date, and confirm that these composite interference contours are grandfathered;

3. modify Section 22.165(d) to: (a) allow incumbents to employ a 21 dBμV/m formula or other real-world engineering showing to demonstrate that fill-in transmitters' interference contours do not extend beyond a wide-area system's composite contour determined according to Section 22.537(f); and (b) broaden the definition of "fill-in" to include areas sufficiently surrounded by composite interference contours so as to preclude the geographic licensee from providing service in such areas;

4. require non-incumbent geographic licensees to meet minimum construction benchmarks before allowing alienation or partitioning;

5. relax anti-collusion auction rules to provide a "safe harbor" for discussions regarding acquisitions, mergers and intercarrier arrangements;

6. clarify that grandfathered, non-exclusive licensees operating on 929 MHz exclusive channels have no right to interference protection and co-channel separation;

7. clarify the interference rights and responsibilities of rural radio service and BETRS licensees;

8. redefine the "substantial service" coverage standard according to specific objective criteria; and

9. establish specific technical standards to govern interference between adjacent, co-channel geographic licensees.

In the instant Comments, ProNet focuses on Items 1-7 above and shows that its proposed modifications and clarifications will resolve many issues raised by other petitioners. Further, ProNet will discuss how current processing of pending 931 MHz applications has been skewed to maximize

"white space" for the upcoming auction to the detriment of incumbent carriers seeking to expand wide-area systems.

II. THE COMMISSION MUST MODIFY ITS 931 MHz APPLICATION PROCESSING PROCEDURES RATHER THAN DISMISS ALL APPLICATIONS DEEMED "BLOCKED" BY THE ALGORITHM

ProNet agrees with commenting parties who asserted that the Commission's intention to dismiss all mutually-exclusive applications filed prior to July 31, 1996 is improper and should be reconsidered. The parties addressing this issue noted that dismissal will: (a) constitute a retroactive application of a rule without express statutory authorization; (b) violate Section 309(j)(6)(E) of the Act, which requires the Commission to use engineering solutions, negotiation, threshold qualifications, service regulations and other means to avoid mutual exclusivity in licensing proceedings; (c) subvert the holding in *McElroy Electronics Corporation v. FCC*, 86 F.3d 248 (D.C. Cir. 1996) requiring the Commission to process applications where the corresponding cut-off period has expired; (d) deviate from the precedent established in services such as MDS where pending mutually exclusive applications were processed under pre-auction rules; and (e) invalidate rights guaranteed to conflicting applicants by the doctrine set forth in *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945).[2/] Moreover, assuming *arguendo* that competitive bidding rules could be retroactively applied to pending mutually-exclusive applications, Section 309(j)(1) requires the Commission to hold an auction among those mutually exclusive applicants rather than dismissing

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[2/] *See* Personal Communications Industry Association Petition for Reconsideration ("PCIA Petition"), at 17-18; Robert Kester et al. Consolidated Petition for Reconsideration ("Kester Petition"), at 15-18; Metrocall, Inc. Petition for Reconsideration and Clarification ("Metrocall Petition"), at 11-16; Blooston, Mordkofsky, Jackson and Dickens Petition for Reconsideration ("Blooston Petition"), at 11-16.

them and starting anew.[3/]

Of all the foregoing reasons for reconsidering dismissal of pending mutually exclusive applications, the demands imposed on the Commission by Section 309(j)(6)(E) may be the most compelling. Duty-bound to resolve mutual exclusivity before resorting to competitive bidding, the Commission has already developed a bright-line test for distinguishing among mutually-exclusive applicants-- namely, applicants proposing or extending wide-area 931 MHz systems are to be encouraged and preferred over applicants who request single-site transmitters in order to offer local service.[4/] Moreover, the Commission's processing algorithm is supposedly designed to acknowledge and give a preference to wide-area systems whenever possible.[5/]

ProNet believes that many of the mutual exclusivity cases the Commission intends to resolve with blanket dismissal could be resolved merely by according a preference to applicants seeking to expand existing wide-area networks; a secondary preference to could be accorded applicants proposing new wide-area networks. In addition, the Commission should give effect to all efforts by pending applicants to resolve mutual exclusivity by frequency amendments and other negotiated

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[3/]Blooston Petition, at 12-13; Kester Petition, at 14; Metrocall Petition, at 16.

[4/]*See, e.g.*, Amendment of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, *First Report and Order*, GEN Docket No. 80-183, 89 FCC 2d 1337, 1356 (1982), *recon.* 93 FCC 2d 908 (1983); *Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, CC Docket No. 92-115, 9 FCC Rcd 6513, 6518 (1994) ("Part 22 Rewrite"). *John D. Word*, 7 FCC Rcd 3201 (Mob. Svc. Div. 1992) (applications for new 900 MHz systems are properly rejected in favor of conflicting applications to expand existing co-channel systems).

[5/]Public Notice, *FCC Releases Results of Test Run of Its New Software for the Processing of 931 MHz Paging Applications*, Mimeo 1803, released August 14, 1995 ("August 14 Public Notice").

solutions.

These tools for minimizing or eliminating mutual exclusivity notwithstanding, it appears that the Commission actually favors wholesale dismissal of conflicting applicants. For example, although ProNet's wholly-owned subsidiary Contact Communications Inc. ("Contact") holds a 931.1375 MHz license for two sites in central Houston, Texas (under Call Sign KNKM 594), the processing algorithm indicates that Contact's multiple co-channel expansion applications in and around metropolitan Houston are somehow "blocked." Another example involves Contact's applications for an expansion site at Austin, Texas on 931.1375 MHz, which was "MXed" by single-site applicants, Cecelia Sulak (File No. 22527-CD-P/L-95) and Frank Lepera (File No. 22308-CD-P/L-95). Through its research, Contact was able to identify vacant 931 MHz channels in the Austin area and negotiated agreements with Ms. Sulak and Mr. Lepera whereby they could amend to "clear" frequencies and Contact would be able to extend its 931.1375 MHz network to Austin. The appropriate amendments and related documentation were filed with the Commission. Nevertheless, Contact has determined that the Commission's database currently indicates that Ms. Sulak and Mr. Lepera are continuing to prosecute applications requesting 931.1375 MHz in the Austin area. These examples reveal that the Commission is neglecting its Section 309(j)(6)(E) obligations.

III. THE COMMISSION SHOULD RESOLVE ALL PENDING LICENSING MATTERS BEFORE HOLDING AUCTIONS

In their Petitions, ProNet and other petitioners discussed the need to resolve pending licensing matters prior to inauguration of geographic license auctions. Specifically, auctions should be deferred until all pending applications have been granted or dismissed, and all related litigation

is resolved.[6/] Allowing the Commission staff to resolve these outstanding matters prior to auctions will minimize or eliminate ambiguity regarding what exactly is being auctioned.[7/] Uncertainty regarding this information will also make it difficult for incumbent and prospective applicants to attract investors and raise capital for auctions and ensuing infrastructure construction.

Moreover, resolution of pending applications and litigation prior to auctions will permit closure with respect to the rules superseded by the 2nd R&O.[8/] The Commission has long acknowledged that litigation regarding application processing rules should be governed, to the extent possible, by rules existing at the time the applications were filed.[9/]

[6/] *See* Western Paging I Corporation and Western Paging II Corporation Petition for Reconsideration or Clarification ("Western Petition"), at 1-3; and Schuylkill Mobile Fone, Inc. Petition for Reconsideration or Clarification ("Schuylkill Petition"), at 1-3.

[7/] Until the Commission disposes of pending applications to expand existing networks or establish new service, auction participants will be unable to value the MTAs and EAs for which they intend to bid.

[8/] Closure will avoid a repeat of the aftermath of the *Part 22 Rewrite Order, Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, 9 FCC Rcd 6513, 6533 (1994), in which new rules were stayed pending resolution of outstanding litigation, *see Order* in CC Docket No. 92-115, 10 FCC Rcd 4146, 4147-4148 (1995), but the stay was never lifted, and certain litigation remains unresolved over two years later.

[9/] In the *Part 22 Rewrite Order,* the Commission ordered the Common Carrier Bureau:

> to act on all pending petitions for reconsideration of 931 MHz paging applications prior to the effective date of the new rules. . . . If the Commission or the Bureau have not acted upon the pleadings described above by the date that the rules adopted herein are effective, we shall stay the effect of new Section 22.541 . . . . To the extent these cases can be resolved under existing rules, they should be.

9 FCC Rcd at 6534. While the Commission may apply newly promulgated rules retroactively to pending applications and granted authorizations subject to reconsideration, *Id.* at 6534-35, it must clearly state in the record why such retroactive effect is necessary. *Yakima Valley*

(continued...)

IV. ADDITIONAL SAFEGUARDS ARE NEEDED TO PROTECT INCUMBENT NON-GEOGRAPHIC SYSTEMS

ProNet's Petition demonstrated that 2nd R&O's rules inadequately protect incumbent non-geographic licensees, particularly with respect to construction permits ("CPs") and permissive modifications, including "fill-in" transmitters. These concerns were echoed by several petitioners and should be promptly addressed.

A. Incumbent System Composite Interference Contours Must Be Grandfathered And Must Include All Authorized Transmitters Irrespective Of Grant Date

In its Petition (at 3-5), ProNet requested that the Commission clarify the 2nd R&O and modify new Section 22.503(i) of the Rules to confirm that non-geographic incumbents' composite interference contours based on Section 22.537(f) (Table E-2) include contours associated with all authorized transmitters, including outstanding CPs and CPs authorized after the 2nd R&O's effective date.[10/] Further, ProNet requested that the Commission confirm that incumbent system contours are grandfathered, thereby allowing replacement, modification or relocation of existing or authorized (but not yet constructed) transmitters without the uncovered areas reverting to the geographic licensee.

Four petitioners-- ProNet (at 5-6); Western (at 3-4); Schuylkill (at 3-4); and Blooston (at 16, n.5)-- observed that new Section 22.503(i) will deny interference protection to transmitters

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[9/](...continued)
Cablevision, Inc., 794 F.2d 737 (D.C. Cir. 1986).

[10/]ProNet notes that the term "authorized" normally encompasses valid CPs as well as licensed, constructed transmitters and, further, that nothing in the *2nd R&O* suggests that CPs will not be included in determining incumbents' composite system contours. Nevertheless, clarification of the *2nd R&O* will remove any ambiguity while addressing the concerns of ProNet and other petitioners with respect to "lost" transmitter sites (discussed below).

authorized or reinstated after the 2nd R&O's effective date, irrespective of when the underlying application was filed. The Commission has neither completed processing of pending applications filed prior to the 2nd R&O's release, nor has it resolved all litigation involving pending applications;[11/] therefore, Section 22.503(i) will deny interference protection to incumbents' authorized sites, thus contravening a stated purpose of the 2nd R&O (at ¶ 6). Accordingly, the Commission must revise Section 22.503(i) to affirm that applications pending on or before July 31, 1996 and ultimately granted will be entitled to interference protection, irrespective of grant date.

The Commission must also grandfather the fixed-radii, circular interference contours provided for in Section 22.537(f) (Table E-2) of all authorized transmitters, even where an authorized site becomes unavailable due to circumstances beyond the incumbent's control. Absent this action, geographic licensee's will assert that the area encompassed by the lost site reverts to their control with no opportunity for the incumbent to secure a replacement. Leaving incumbents without recourse when a CP site is no longer available for use due to the delay between filing and grant of the underlying application, or when an operational site is rendered useless,[12/] needlessly jeopardizes public service provided by incumbents. Coupled with the relief requested below, grandfathering interference contours will remove these threats and avoid additional regulatory burdens, *i.e.,* Section 22.142 (d) applications, requests for Special Temporary Authority ("STA") or extension of time to

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[11/] As noted in ProNet's Petition (at 5), and as discussed above, thousands of 931 MHz applications remain pending before the Commission, and hundreds of applications, construction permits and licenses remain subject to litigation.

[12/] For example, paging operators must routinely relocate transmitters due to damage to an existing site or loss of lease. Arch Communications Group, Inc. Petition for Partial Reconsideration and Request for Clarification ("Arch Petition"), at 3; ProNet Petition, at 14.

construct.

Several petitioners also requested that the Commission clarify its definition of "contiguous sites" for purposes of exchanging incumbent licenses for a single system-wide license. These petitioners are concerned that: (a) because "contiguous sites" is undefined, the status of remote transmitters or transmitters in the periphery of a network is unclear;[13/] and (2) areas not wholly encompassed by the composite interference contours of contiguous transmitters but nevertheless foreclosed to geographic licensees will remain unserved.[14/] To promote the most efficient use of spectrum and accelerate the provision of service to the public, ProNet agrees that incumbent systems should include all co-channel transmitters licensed to the incumbent, irrespective of contiguity. Further, ProNet supports petitioners who assert that an area surrounded by an incumbent's interference contours (albeit not wholly-encompassed) so that service to the area by the geographic licensee would interfere with the incumbent should also be included in the incumbent's system license.[15/] The simplest way to effect this change is to make such territory available for incumbent expansion on a permissive "fill-in" basis, as suggested in ProNet's Petition (at 18-19).[16/]

[13/] *See* Blooston Petition, at 8-9; Metrocall, at 22.

[14/] These situations include creases or "doughnuts" formed by composite contours, and small gaps in system coverage along coastlines. *See* ProNet Petition, at 18; Blooston Petition, at 9; Metrocall, at 22-23.

[15/] *See* Blooston Petition, at 9;Metrocall Petition, at 22-23; Nationwide Paging, Inc. Petition for Partial Reconsideration and Clarification ("NPI Petition"), at 11; Morris Communications, Inc. Petition for Partial Reconsideration and Clarification ("Morris Petition), at 11.

[16/] In its Petition (at 10), ProNet provided specific revisions to Section 22.165(d)(1) to effect this proposed change.

B. The Commission Should Adopt More Flexible Rules For Fill-in Transmitters By Incumbent Non-Geographic Licensees

In its Petition, ProNet demonstrated that the 2nd R&O's exclusive reliance on Section 22.537(f) (Table E-2) to define the interference contours of 929/931 MHz fill-in transmitters will prevent incumbents from making modifications necessary to maintain current networks and may expose fill-in transmitters installed under the temporary rules governing licensing of paging facilities during the pendency of this proceeding (the "Interim Licensing Rules") to retroactive challenge. Accordingly, ProNet requested that the Commission continue to allow 929/931 MHz incumbents to employ the alternative 21 dBμV/m formula initially proposed in the Notice of Proposed Rule Making ("NPRM") or other real-world engineering showing to demonstrate that internal system modifications do not expand their outer perimeter interference contours.[17/] This will allow non-geographic incumbents the flexibility to respond to actual or *de facto* loss of transmitter sites. It may also eliminate Section 22.142(d) relocation applications and STA requests because replacement sites could be conformed to the incumbent's composite interference contour using standard engineering techniques.[18/]

[17/] As discussed in ProNet's Petition (at 12-13) and in the Blooston Petition (at 9-10), the Commission staff clarified the Interim Licensing Rules to confirm that, while Table E-2 established the outer perimeter of existing 929/931 MHz systems, licensees could use the 21 dBμV/m formula to derive the interference contour of proposed transmitters to determine whether these proposed transmitters qualified as fill-ins.

[18/] As ProNet showed in its Petition (at 15-16), geographic licensees cannot provide service to areas internal to an incumbent system; therefore, requiring geographic licensee consent in such instances will not serve the Commission's objective of "protecting the geographic area licensees from co-channel interference from the incumbent licensees." *2nd R&O* at ¶57. Rather, it will only empower geographic licensees to block the introduction or improvement of service by incumbents to gain a competitive advantage, extort monetary payment, or use as leverage to coerce a buyout.

ProNet's concerns regarding the need for flexible application of the fill-in rules for 931 MHz, particularly with respect to "lost" transmitter sites, and the relief necessary to address these concerns, are shared by Arch and Blooston. Arch accurately describes the "routine" loss of tower sites faced by incumbent carriers, as well as the need for flexibility to relocate transmitters in converting to new, high-speed protocols.[19/] Likewise, Blooston notes that the incumbent flexibility resulting from use of the 21 dBμV/m formula does not encroach on a geographic licensee's "white space;" therefore, accommodating the real-world needs of incumbent carriers will not undermine the Commission's objective of protecting the interests of geographic licensees.[20/] Moreover, the record in this proceeding is replete with examples of the critical importance of allowing incumbent paging operators to modify and add transmitting facilities in response to public demand.[21/]

Arch requests that the Commission allow incumbent non-geographic licensees to employ an alternative formula, proposed in CompComm, Inc.'s March 18, 1996 Comments on Geographic Licensing Proposal (at 5-6) to determine whether a new site qualifies as a fill-in. Blooston agrees with ProNet that the Commission should continue to allow use of the 21 dBμV/m formula. ProNet

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[19/]Arch Petition, at 3-4. Loss of proposed transmitter sites is an especially critical issue for 931 MHz incumbents. 931 MHz applications were subject to a two year *de facto* freeze on application processing pending development of the Commission's processing software and, more recently, the freeze imposed in the instant proceeding. Meanwhile, towers have been deconstructed and once-available space on towers or buildings has been filled due to the literal explosion of new wireless services.

[20/]Blooston Petition, at 10; *see also*, ProNet Petition, at 16.

[21/]*See, e.g.,, 1st R&O*, 11 FCC Rcd at 16581-16582 (1996); *2nd R&O* at ¶57. Indeed, the Commission itself initially proposed allowing permissive relocation of incumbent transmitters without geographic licensee consent due to, *inter alia*, loss of a transmitter site; or by new construction nullifying coverage from the transmitter. *NPRM*, 11 FCC Rcd at 3117.

submits that its proposed revisions to Section 22.15(d) provide the requisite flexibility, by allowing any real-world-based engineering showing acceptable to the Commission.[22] At minimum, however, it is critical that the Commission finally address the issue of lost transmitter sites and provide relief to affected incumbents. Because ProNet (and presumably other carriers) have CPs expiring in the next several months, this relief must be on an expedited basis.[23]

V. THE COMMISSION SHOULD REVISE ITS PARTITIONING RULES TO PREVENT AUCTION WINNERS FROM SELLING GEOGRAPHIC LICENSES WITHOUT PROVIDING PUBLIC SERVICE

In its Petition (at 24-25), ProNet requested that the Commission enforce MTA/EA coverage requirements to prevent auction winners from engaging in gaming, speculation and extortion.[24] Specifically, ProNet recommended that any alienation of a geographic license by a non-incumbent auction winner should be conditioned on: (1) provision of actual service to a minimum of ten percent of the MTA/EA population; or (2) satisfaction of the three year population coverage requirement

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[22] *See* ProNet Petition, at 10-11.

[23] The *2nd R&O* (at ¶57) permits incumbent non-geographic licensees to extend beyond existing composite interference contours only after obtaining the geographic licensees consent. Leaving aside the impracticality of obtaining such consent from a competitor, no geographic licensees currently exist. Moreover, it may take a year or more to issue such geographic licenses because: multiple petitions for reconsideration have been filed with respect to the *2nd R&O;* even after these petitions are resolved, there will be some delay in scheduling auctions and additional delay in licensing auction winners; and, finally, there are more than 100 paging channels to be auctioned. ProNet, however, has CPs expiring in May and July 1997 where the underlying site is no longer available.

[24] ProNet agrees with numerous petitioners who argue that the Commission's auctioning of geographic areas where incumbents already meet the two thirds coverage requirements prescribed in new Section 22.503(k)(2) invites insincere, speculative applicants. *See, e.g.,* Blooston Petition, at 10-11; PageNet Petition, at 2; Advanced Paging et al., Petition for Reconsideration ("Advanced Petition"), at 6-9; PCIA Petition, at 5-7; Metrocall Petition, at 8.

set forth in new Section 22.503(k)(1) of the Rules, *i.e.*, one third of the market population.

In its Comments on the Further Notice of Proposed Rule Making, PageNet recommends requiring all geographic licensees, incumbents and newcomers, to meet the second coverage benchmark set forth in new Section 22.501(k)(2) of the Rules, *i.e.*, two thirds of the market population, as a condition to partitioning.[25/] ProNet believes that a lesser coverage requirement will suffice to deter abusive partitioning, while PageNet's proposal may prevent legitimate transactions involving an incumbent operator that obtains a geographic license. Accordingly, the Commission should decline to adopt PageNet's more restrictive limitations on partitioning.

VI. THE ANTI-COLLUSION RULES ADOPTED IN THE 2ND R&O MUST BE RELAXED

ProNet and several other petitioners agree that the Commission's application of its anti-collusion rules, namely, Section 1.2105, to the paging industry is unduly harsh, and particularly inappropriate given the paging industry's current state. Specifically, the Commission is urged to grant a "safe harbor" to permit discussions regarding acquisitions, mergers and even intercarrier arrangements.

The Commission's assertion that it lacks "a sufficient record at this time to make such a

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[25/] *See* PageNet Comments on Further Notice of Proposed Rule Making (filed May 1, 1997), at 12. ProNet agrees with Metrocall (at 16-18), PageNet (at 6-9), Arch (at 6), PCIA (at 7-10), Blooston (at 6-8), and Advanced (at 11-12) that the Commission's "substantial service" alternative to coverage requirements serves no beneficial purpose and encourages the very speculative, abusive applications that the Commission claims it is seeking to prevent. The "substantial service" alternative must be eliminated.

decision" (2nd R&O at ¶156) is simply incorrect.[26] The current economic challenges faced by the paging industry are well-documented.[27] Market consolidation has been occurring in the paging industry for several years, enabling greater economies of scale and more effective competition. Similarly, intercarrier arrangements are routinely negotiated by paging carriers, resulting in substantial benefits to paging subscribers. Barring these discussions during an auction's pendency will interfere with longstanding market relationships to the detriment of consumers and carriers alike.[28]

VII. THE COMMISSION SHOULD CLARIFY INTERFERENCE PROTECTION STANDARDS FOR NON-EXCLUSIVE 929 MHz INCUMBENTS

ProNet's Petition (at 23-24) requested revision of new Section 90.493 to provide that 929 MHz incumbents who are licensed on the 35 exclusive 929 MHz channels on a grandfathered, non-exclusive basis have no right to interference protection and co-channel separation requirements under Section 22.503(i). Absent these corrections, non-exclusive 929 MHz licensees, who were compelled to share their channels under the pre-existing Part 90 rules, will be able to evict co-channel geographic licensees from the channel *even if* the geographic licensee had previously qualified for local, regional or nationwide exclusivity on that channel.

In their respective petitions, PageNet (at 17-19) and PCIA (at 16-17) also request that the Commission revise Section 90.493 to remove this windfall for non-exclusive 929 MHz incumbents.

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[26] *See* PCIA Petition, at 23; ProNet Petition, at 26.

[27] *See* ProNet Petition, at 26; Blooston Petition, at 19; PageNet Petition, at 3.

[28] PageNet Petition, at 15; PCIA Petition, at 23; Blooston Petition, at 19.

Regarding grandfathered 929 MHz incumbents who never sought exclusivity, or whose qualifying licenses have terminated by final order, ProNet agrees with these petitioners. ProNet cautions, however, that with respect to incumbents who properly sought exclusivity pursuant to the former rules, the Commission must determine whether these operators are entitled to interference protection. PCIA's statement that licensees who "did not obtain, by choice or otherwise, exclusivity for their systems" should be denied interference protection (PCIA Petition, at 16) should not include applicants for exclusive systems whose applications remain pending or are otherwise subject to challenge. In this regard, ProNet reiterates that the Commission must resolve any and all pending litigation with respect to licensing matters, specifically including litigation with respect to channel exclusivity and associated pending applications, waiver requests, and reinstatement requests.[29/]

VIII. RURAL RADIO AND BETRS SHOULD BE TREATED THE SAME AS OTHER USERS OF PAGING SPECTRUM

ProNet demonstrated in its Petition (at 20-21) that ¶35 of the 2nd R&O and new Rule 22.723 must be clarified to prevent Rural Radiotelephone Service ("RRS") licensees, including BETRS licensees, from continuing operations on a secondary basis that cause actual interference to a primary paging licensee for six months after receiving notice of interference.[30/] After reviewing the other

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[29/]As previously stated in this proceeding, subsidiaries of ProNet are engaged in litigation before the Commission with PageNet regarding, *inter alia,* pending applications and local exclusivity requests in Florida, and PageNet's co-channel nationwide exclusivity. ProNet's subsidiaries should not be denied co-channel interference protection merely because this litigation has delayed processing of their applications and exclusivity requests.

[30/]Specifically, ProNet showed that the *2nd R&O* provides no justification for allowing RRS licensees to continue interfering operations for a full six months after notice; that the NPRM (continued...)

petitions, ProNet is compelled to expand briefly upon the status of RRS, particularly BETRS, in the paging bands. In short, based on the record in this proceeding, there is no justification for the additional preferential treatment sought by BETRS operators.

A number of petitioners argue that BETRS operators should be empowered to compel geographic licensees to partition their licenses to accommodate BETRS at no cost to the rural telephone company.[31] The same petitioners also object to the Commission's relegation of BETRS to secondary licensing, and insist that site-by-site BETRS licensing must be retained on a co-primary basis with paging.[32] While ProNet is sympathetic to the concerns of BETRS providers, the Commission has already conveyed substantial concessions to BETRS in this proceeding. In addition to grandfathering all existing BETRS operations, the 2nd R&O enables BETRS providers to participate in auctions, to obtain geographic partitions, and to obtain site-specific licenses on a secondary basis.[33] The Commission made these concessions notwithstanding its findings that

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[30](...continued)
provided no notice that such a preferential rule for RRS operators was contemplated; and that a six month grace period for operations causing actual interference is incompatible with the Commission's longstanding definition of secondary operation.

[31]*See* Century Telephone Enterprises, Inc. Petition for Reconsideration ("Century Petition"), at 8-9; Nucla-Naturita Telephone Company Petition for Reconsideration ("Nucla-Naturita Petition"), at 8-9; Big Bend Telephone Company Petition for Reconsideration ("Big Bend Petition"), at 8-9; Mid-Rivers Telephone Cooperative, Inc. ("MRTC Petition"), at 8-9 (the foregoing petitioners are heretofore referred to collectively as the "BETRS Petitioners").

[32]BETRS Petitioners, at 5-7; Petition for Reconsideration of the National Telephone Cooperative Association ("NTCA Petition"), at 2-8.

[33]*2nd R&O*, at ¶¶34-35. Moreover, BETRS Petitioners' and NTCA's assertion that demand for BETRS continues because wireless carriers are unlikely to provide services in rural areas in the near future belies their claims that partitioning will be unavailable and that secondary operations will be prematurely shut down on demand by paging operators.

demand for BETRS has substantially declined, and that any wireless carriers may provide rural local loop service as an inexpensive alternative to BETRS. 2nd R&O, at ¶33. Accordingly, the Commission should reject the foregoing proposals for additional BETRS concessions.

IX. CONCLUSION

WHEREFORE, the foregoing premises considered, the Commission's Second Report and Order should be modified and clarified as requested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Maleesha Spriggs, a secretary in the law offices of Gurman, Blask & Freedman, Chartered, do hereby certify that I have on this 9th day of May, 1997 caused copies of the foregoing "COMMENTS ON PETITIONS FOR RECONSIDERATION" to be sent first class mail, and postage prepaid to the following:

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